United States Court of Appeals

for the Second Circuit

APPELLEE’S BRIEF

74-2588

United States Court of Appeals

For the Second Circuit

Docket No. 74-2588

In Re SEEBURG-COMMONWEALTH UNITED LITIGATION.

BERRY PETROLEUM COMPANY, an Arkansas Corp. (Dissolved), *et al.*,

Plaintiffs-Appellants,

v.

ADAMS & PECK, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES, ALLEN & COMPANY, INCORPORATED, ARTHUR YOUNG & COMPANY and THE KLEINER BELL GROUP

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Plaintiffs-Appellants,

v.

ADAMS & PECK; ALLEN & COMPANY, INCORPORATED; AMERICAN STOCK EXCHANGE; ARTHUR YOUNG & COMPANY; A. BRUCE ROZET; OLIVER A. UNGER; IRVING GOLDSTEIN; SIDNEY KIBRICK; RICHARD A. SARAZAN; RODNEY W. LOEB; ARNE KALM; H. IGOR ANSOFF; GOTTFRIED VON MEYERN HOHENBERG; HOWARD D. MARTIN; PETER GETTINGER; KLEINER, BELL & CO.; KLEINER, BELL & CO., INC.; BURT KLEINER; LIONEL BELL; RALPH SHAPIRO; THEODORE SAYERS; PETER HUANG; BENJAMIN F. BRESLAUER; SOL STAMESHKIN; BRYCE CRIDER; ELY A. LANDAU; JAMES A. LEWIS ENGINEERING, a Division of UNIVERSITY COMPUTING CORPORATION; and VARIETY INC.,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF OF APPELLEES, ALLEN & COMPANY, INCORPORATED, ARTHUR YOUNG & COMPANY and THE KLEINER BELL GROUP

Defendants, Allen & Company, Incorporated ("Allen"), Arthur Young & Company ("Arthur Young") and the

Kleiner Bell Group ("Kleiner Bell"), submit this brief in support of the order and judgment below granting summary judgment and dismissing the complaint herein.

Questions Presented

1. Are not the claims of these plaintiffs, and the class purportedly represented by them, who acquired stock of Commonwealth United Corporation on October 31, 1968, barred by the final judgment entered in *Sherlee Land v. Commonwealth United Corporation,* following a determination that that suit was to be maintained as a class action for all persons who acquired Commonwealth stock between October 16, 1968 and August 1, 1969?

2. May lawyers who bring one purported class action "opt out" a "class" from another judicially declared class action (a) at a time when their case has not been declared a class action, (b) in the absence of any notice to persons claimed to be represented in their action, and (c) when they lack specific authority to act for the individuals they would seek to represent?

3. Can a dissolved corporation maintain an action, under § 10(b) of the Securities Exchange Act of 1934, based upon exchange of its assets for stock, when the corporation immediately distributed the stock to its own shareholders and accordingly suffered no loss, and the distributee-shareholders who allegedly suffered loss purport to maintain the action on the same substantive grounds?

4. Did the District Court correctly determine that the plaintiffs knew or should have known of the alleged fraud more than three years prior to bringing suit, and that their claims were barred by the applicable two or three year statute of limitations?

5. Are not the plaintiffs estopped and barred by laches from maintaining this action because of their receipt and acceptance of benefits of the settlement in *Land* v. *Commonwealth* while withholding commencement of this new suit until numerous parties defendant, who thought they were settling the cause of action dismissed below, were committed to the *Land* settlement?

Statement of the Case

This case (hereinafter referred to as "*Berry II*") is the latest, and we trust the last, to arise from the financial difficulties encountered by Commonwealth United Corporation ("Commonwealth") in 1969. This case stems from the acquisition of Berry Petroleum Company by Commonwealth as part of what, in hindsight, was an overly ambitious acquisition program.

The Berry stockholders received Commonwealth stock through an agreement whereby Commonwealth was to acquire all of Berry's assets in exchange for Commonwealth stock. On October 16, 1968, Berry sent to each of its stockholders a notice of special meeting to approve the proposal, together with a copy of the proxy statement describing the proposed acquisition by Commonwealth of the Seeburg Corporation (A19, A36-37).* This proxy statement was a principal document claimed in ***Berry II*** to be false and misleading; the same proxy statement was also challenged in the earlier *Land* suit, about to be described. The ex-

* The reference "A " refers to the appropriate page in the printed appendix; the reference "R " refers to a document in the record on appeal; the reference "SR " refers to a document in the supplemental record on appeal; the reference "Pl. Br." refers to the Plaintiffs-Appellants' brief.

change transaction was consummated on October 31, 1968 when Commonwealth delivered its stock to Berry Petroleum, which immediately distributed it to the Berry stockholders and then on that day dissolved (A17, A19, A36-37, A124).

The *Seeburg-Commonwealth United Litigation,* of which this case is a part, began in August of 1969, with the filing of the action entitled *Sherlee Land* v. *Commonwealth United Corporation, et al.,* in the Southern District of New York (A103). By December 14, 1969, 9 other cases had been commenced in New York alone (A70), and a well-publicized proceeding had been brought by the Securities and Exchange Commission against Commonwealth on October 2, 1969. *New York Times,* October 3, 1969, at 63, col. 4; *Wall Street Journal,* October 3, 1969, at 28, col. 2. By decision and order of May 4, 1970, the Judicial Panel on Multidistrict Litigation ordered consolidated proceedings in 16 then pending cases, and assigned them to the Honorable Frank H. McFadden for pretrial purposes in the United States District Court for the Southern District of New York. *In re Seeburg-Commonwealth United Merger,* 312 F. Supp. 909 (J.P.M.L. 1970).

In 1970 and 1971, four of the five plaintiffs in this case, represented by the very same attorneys now before this Court, commenced two actions in the Western District of Arkansas against Commonwealth which were later consolidated ("*Berry I*") (A37). The Multidistrict Panel declined to transfer the *Berry I* case to the Southern District of New York, citing the plaintiffs' contention that the issues in that case were different and that discovery was virtually complete. *In re Seeburg-Commonwealth United Merger,* 333 F.Supp. 911 (J.P.M.L. 1971).

There followed extensive and successful efforts to cope with a plethora of suits involving Commonwealth and numerous other defendants. With the exception of *Berry I,* all of the Commonwealth litigation was coordinated and consolidated before Judge McFadden in the Southern District of New York. Consolidated pleadings, discovery proceedings, class action orders, hearings involving exploration of the claims, issues, and facts, and eventually entry of final judgments (A227, A172, A193), disposed of virtually all the controversies and have resulted in the reorganization of Commonwealth (now Iota Industries, Inc.). Defendants Allen, Arthur Young, and Kleiner Bell ultimately contributed substantial amounts to the settlement of the Commonwealth litigation (A245, A176, A223).

In the course of the consolidated proceedings in New York, and by order dated February 2, 1972, the *Land* case was declared to be a class action* (A148). The class was defined to include all persons who acquired Commonwealth securities between October 16, 1968 and August 1, 1969 and who sustained losses thereon (A148). Notice of the class action determination was given by both published and individual mailed notice to all those who acquired Commonwealth stock in that period, including plaintiffs herein (A148, A37). Counsel in *Berry I*, which had not then been declared a class action, then filed in the Southern District of New York court a document (of which more later) in which they purported to "exclude" from the *Land* class the people they sought to represent (A43).

In efforts to resolve all of the litigation, negotiations proceeded among attorneys for the various parties in the many lawsuits, including the attorneys in the *Berry I* cases.

* The *Land* complaint (A119) was in two counts. Count I contained the class claims, while Count II set forth derivative causes, not involved here.

A stipulation of settlement, dated May 26, 1972, was made in the *Land* case whereunder, *inter alia,* the plaintiffs in the *Berry I* case later received 54,365 shares of Commonwealth stock in settlement of their claims against Commonwealth (A153, § 1.3; A157, § 4.1(a); A59; A38). $325,000 cash was paid as additional consideration for settling *Berry I* (A52; A59; A38.)

The *Berry I* settlement (A49) was consummated following entry of a class action order in that case (A38). Appellees Arthur Young & Company and the Kleiner Bell Group, defendants in the *Land* suit and in the present *Berry II* action, consummated their settlements with the *Land* class and final judgments were entered in their favor dismissing the class claims as against them (A193, as to Arthur Young; A227, as to Kleiner Bell Group). Appellee Allen, initially unnamed as a defendant in the *Land* suit, became a party to the settlement therein by a separate stipulation of concurrence in the *Land* stipulation of settlement (A245).

This suit followed the entry of some of the final judgments in *Land.* The new action (*Berry II*) brought in the United States District Court, Northern District of Texas, on December 15, 1972* purports to be a cla action on behalf of the same persons who were represented by the *Berry I* plaintiffs (A13). Plaintiffs in **Berry II** are the same as in **Berry I** except for the addition in **Berry II** of McAlester Fuel Co. (A13, A49).

The basic charges in this latest case, like the charges in the previous lawsuits, are of acts and omissions which allegedly manipulated the market price of the stock of Commonwealth during 1968 and 1969 and induced plaintiffs

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* The suit was transferred to the Southern District of New York, McFadden, *J.*, by the Judicial Panel on Multidistrict Litigation. In re Seeburg-Commonwealth United Merger, 362 F.Supp. 568 (J.P.M.L. 1973).

to acquire and retain Commonwealth securities. Plaintiffs charge violations of § 10(b) and Rule 10b-5 of the Securities Exchange Act. Various documents filed with the Securities and Exchange Commission during the period are claimed to be false, and plaintiffs claim to have relied upon them in acquiring Commonwealth stock.

The Opinion Below

It was on this state of the record that the District Court, thoroughly familiar with the claims asserted in the many lawsuits arising from Commonwealth's difficulties,* and thereafter reasserted again in *Berry II,* granted summary judgment (A57, A58). Considering the entire record before him, Judge McFadden concluded that the plaintiffs in this action were and are within the class defined in the *Land* action, *i.e.,* all persons "who at any time during the period commencing October 16, 1968 and ending August 1, 1969 acquired for value securities issued by Commonwealth . . ." (A148, A60-61). The District Court held that Berry's sale of its assets "could not be effective until approved by the shareholders, an event which occurred after October 16, 1968" (A61). The Court further held that, since the Commonwealth stock was not delivered to the former Berry shareholders until October 31, 1968 in exchange for their Berry shares, "[t]he conclusion that the Berry stock-

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* Pursuant to order of the Judicial Panel on Multidistrict Litigation, all pretrial proceedings in this and related cases were transferred to the United States District Court for the Southern District of New York under the supervision of the Hon. Frank H. McFadden. In re Seeburg-Commonwealth United Merger, 312 F.Supp. 909 (J.P.M.L. 1970). This system, like the individual calendar system, placed complete control of the case in Judge McFadden and by this efficient system the judge can "observe the status of each case, procedurally as well as substantively." As a result, the judge can determine the stage at which disposition of the proceeding can be made. Segal v. Gordon, 467 F.2d 602 (2d Cir. 1972).

holders acquired [Commonwealth] shares for value after October 16, 1968 is therefore inescapable" (A62).

Judge McFadden observed that the decision by the Judicial Panel on Multidistrict Litigation not to transfer the *Berry I* action to New York, *In re Seeburg-Commonwealth United Merger,* 333 F.Supp. 911 (J.P.M.L. 1971), was not because the *Berry I* plaintiffs were not within the *Land* class, but because there were only limited questions of fact common to the acts of the defendants and plaintiffs had completed their discovery and were proceeding to trial (A62). The Court further noted that the order of the Panel denying transfer of *Berry I* had recognized the overlap of the *Berry I* and *Land* cases (A62).

The Court further held that:

> "The *Berry* stockholders who received benefits under the *Berry* settlement were required to execute releases and forego recovery in *Land* to which they were otherwise entitled. The *Berry I* plaintiffs were members of the *Land* class and the creation of a separate class for settlement of the *Berry I* case did not remove them from the *Land* class." (A63)

On the issue of a purported exclusion of *Berry* plaintiffs, which was filed in the *Land* case, the Court concluded:

> "that counsel for a class, whether or not this determination has been made, cannot opt out for the class unless he has specific authority to do so from each member of the class and even then he would have to identify specifically by name those members for whom he is acting. Opting out is an individual right to be individually and specifically exercised and cannot be the subject of a blanket exclusion. Such a rule would create chaos in the attempted management of class actions." (A63)

The Court found that there was no effective opting out by the *Berry I* class *qua* class (A64). The Court held that the four named plaintiffs in *Berry I*, J. E. O'Daniel, Yvonne Law, Gerland P. Patten & Co., Inc. and Berry Petroleum Company, had effectively and individually opted out of the *Land* action by reason of the request for exclusion filed therein by the attorneys they had personally retained (A63-64).

Accordingly, the Court concluded that persons in the *Berry I* class, except for the named plaintiffs, were bound by the *Land* judgments of dismissal and therefore could not maintain an action for the same acts complained of in *Land* (A64).

The Court further held that Berry Petroleum had no standing to sue because it had not suffered any damages. Immediately upon receipt of the Commonwealth shares, Berry Petroleum transferred these shares to its stockholders without loss to itself (A64-65) and was thereupon dissolved that same day (A61).

Finally, as an independent ground for dismissal, the Court found that *Berry II* is barred even by the longer of the two possibly applicable statutes of limitations of the forum state, *i.e.*, the three year limitation of Article 581-33 of the Texas Securities Act (A65-67). The opinion below rejected plaintiffs' contention that they could not have discovered the alleged fraud, in the exercise of due diligence, within three years of suit.* (A67).

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* The related facts are discussed in Point III *infra*. The more obvious facts which belie plaintiffs' tolling theory include the filing of numerous lawsuits (since consolidated with the *Land* action) and the suspension of trading in Commonwealth stock both by the American Stock Exchange and the Securities and Exchange Commission (alleged in the present complaint, A17-18) which events occurred well prior to December 15, 1969, *i.e.*, more than three years before commencement of *Berry II*.

Summary of Argument

1. Members of the purported *Berry II* class were members of the *Land* class. Only the four *Berry II* named plaintiffs, who were also plaintiffs in *Berry I,* excluded themselves from the *Land* class.* Accordingly, the *Berry II* class with those four exceptions is barred and concluded by the final judgments of dismissal in *Land.*

2. Since Berry Petroleum, upon receipt of its Commonwealth shares, immediately redistributed them to its shareholders, it suffered no loss and fails to state a claim in this action.

3. This action, brought more than four years after the alleged wrongs and more than three years after published notice of the charges and the commencement of similar suits, is barred by limitations.

4. Plaintiffs are estopped by their conduct and barred by laches from maintaining this action. They received the benefits of the *Land* settlement with knowledge of its terms and the contributions to that settlement by the very same defendants they now sue.

I

The claims are barred by the *Land* action proceedings.

A. The Persons Plaintiffs Now Seek to Represent in *Berry II* Were Members of the *Land* Class.

The District Court's order, dated February 2, 1972, declared the class represented in the *Land* case to be

> "[A]ll persons . . . who at any time during the period commencing October 16, 1968 and ending

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* *Berry II* plaintiff McAlester Fuel Co. was not a named plaintiff in *Berry I.*

August 1, 1969 acquired for value securities issued by Commonwealth United Corporation ("CUC") . . . and who have sustained losses thereon as a result of wrongful acts and omissions of defendants herein." (A148)

Plaintiffs in *Berry II* are persons who acquired Commonwealth stock on October 31, 1968 (A17), and thus they clearly fall within the time period encompassed by the *Land* class action order. On October 16, 1968 Berry sent its stockholders notice of a meeting to consider approval of the plan of reorganization whereby the stockholders were ultimately to receive Commonwealth shares (A19, A37). With that notice was sent a prospectus relating to Commonwealth's proposed acquisition of Seeburg (A19). This prospectus gave rise to many of the claims asserted in the *Land* litigation (A123-4). The Berry stockholders thereafter approved a merger between Berry and Commonwealth (A19); and on October 31, 1968, well within the time period encompassed by the *Land* class action order, the Commonwealth shares were delivered to Berry and immediately redistributed to the Berry stockholders (A17, A37).

Plaintiffs' argument that the shares were "acquired" at an earlier date is sheer sophistry. As the Court below appropriately noted (A61), while "the Plan and Agreement of Reorganization" between Berry and Commonwealth was dated August 20, 1968, Section 64-803 of the Arkansas Statutes required that the sale be approved by the holders of two-thirds of the outstanding shares of Berry, the selling corporation. Ark. Stat. Ann. § 64-803 (1947). There is no dispute regarding the Court's finding as to this requirement of Arkansas law. The required approval by Berry stockholders and the acquisition by those

stockholders of their new Commonwealth stock did not take place until after October 16, 1968, and thus was within the paramenters of the *Land* class.

Following entry of the District Court's class action order in *Land* of February 2, 1972 (A148), notice was sent to all persons who are members of the class and could be identified with reasonable effort (A37). Such notices were sent to all persons who make up the putative *Berry II* class (A37). All such persons received notice of the *Land* action—notice which advised them pursuant to Rule 23:*

> "Persons who are within the class and who do not duly file a request for exclusion will be bound by any judgment entered in the *Land* action, whether reached after trial or by settlement and whether or not favorable to plaintiffs." (A151)

Exclusions were to be filed under the Court's order by April 10, 1972 (A150). A purported request for exclusion was filed by counsel for some of the present plaintiffs (A43). (The nature and effect of the "request" will be discussed in Point 1C, *infra.*) No other exclusions by persons claimed to be represented in the present *Berry II* action were received within the time allotted by the Court (or thereafter, for that matter) (A37). Thus with the possible exception of four of the *Berry II* plaintiffs,** all persons who exchanged their Berry shares for Commonwealth

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* Rule 23(c)(2) of the Federal Rules of Civil Procedure provides in pertinent part:

> "The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion . . .".

** *Berry II* plaintiff McAlester Fuel Company was not a named plaintiff in *Berry I* and filed no request for exclusion from the *Land* class (A49).

shares became and have remained members of the class in the *Land* action. *See, In re Four Seasons Securities Laws Litigation,* 502 F.2d 834 (10th Cir. 1974); *Manhattan Ward, Inc.* v. *Grinnell Corp.,* 490 F.2d 1183 (2d Cir. 1974); *Research Corp.* v. *Asgrow Seed Co.,* 425 F.2d 1059 (7th Cir. 1970).

B. Judgments in a Class Action Are Res Judicata and Binding Upon All Persons Defined in the Class Order Who Have Not Excluded Themselves.

Federal Rule 23(c)(3) provides in part:

> "The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class."

It is a fundamental legal proposition that a judgment rendered in a class action is binding on non-party class members "unless a member affirmatively 'opts out' of the litigation at the onset." F.R. Civ. P. 23 (c)(2), (3); *Green* v. *Wolf Corp.,* 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969). *See, In re Four Seasons Securities Laws Litigation, supra; Manhattan Ward, Inc.* v. *Grinnell Corp., supra; Research Corp.* v. *Asgrow Seed Co., supra; Smith* v. *Alleghany Corp.,* 394 F.2d 381 (2d Cir.), *cert. denied,* 393 U.S. 939 (1968); *Snyder* v. *Harris,* 268 F. Supp. 701 (E.D. Mo. 1967), *aff'd,* 390 F.2d 204 (8th Cir. 1968), *aff'd,* 394 U.S. 332 (1969); 3B J. Moore, *Federal Practice* ¶ 23.60 (2d ed. 1969); Wright, *Class Actions,* 47 F.R.D. 169, 177 (1970); Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 45-47 (1968). On November 30, 1972, the District Court entered a Final

Order and Judgment in the *Land* action (A227). The judgment provided that "this action and all actions consolidated therewith are dismissed as against [specified defendants other than Arthur Young including the Kleiner Bell group] with prejudice and without costs . . ." (A229). Later a judgment was entered encompassing the claims against Arthur Young (A193). The *Berry II* plaintiffs are not contending that the issues and cause of action are not the same as in *Land*, nor that the appellees were not parties to *Land*, nor that no final judgment was entered. A judgment on the merits in a prior suit is an absolute bar to a second suit involving the same parties based on the same cause of action. *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955); *Gambocz* v. *Yelencsics*, 468 F.2d 837 (3d Cir. 1972); *Olsen* v. *Muskegon Piston Ring Co.*, 117 F.2d 163, 165 (6th Cir. 1941); *Battle* v. *Cherry*, 339 F.Supp. 186 (N.D. Ga. 1972); 1B J. Moore, *Federal Practice* ¶ 0.405[1] (2d ed. 1965). This action is so barred on behalf of the purported *Berry II* class.

C. The Purported "Request for Exclusion" Filed in the *Land* Action by Attorneys for Certain of the Berry Plaintiffs Was Ineffective to Exclude the "Class".

Plaintiffs assert that the class they now purport to represent has "opted out" of the *Land* class. Indeed, after notice was sent to all class members pursuant to this Court's order, certain attorneys for four individuals and entities filed a document entitled "Request for Exclusion" in the *Land* action (A43). Its prefatory language states:

> "Berry Petroleum Company, a dissolved Arkansas corporation, (herein "Berry"), and the class of persons who obtained common stock of Commonwealth United Corporation pursuant to the terms of a Plan and Agreement of Reorganization (herein the "Plan") of Berry by their attorneys, Lester and

Shults and Keith, Clegg and Eckert, for their Request for Exclusion . . ." (A43)

Following recitals as to the commencement of the *Berry* and *O'Daniel* actions (consolidated as *Berry I*), and other matters, the "Request" concluded:

> "WHEREFORE, the Plaintiffs in the Berry Case and in the O'Daniel Case by their attorneys of record hereby request exclusion from the 'Land' class action with respect to the transaction by said parties with Commonwealth United Corporation as evidenced by the Plan." (A44)

To place this purported "Request" in perspective, the chronology of developments should be considered. The *Land* litigation was begun in August, 1969 (A103). The original *Berry* case was commenced in December, 1970 and the *O'Daniel* case in June, 1971 and they were thereafter consolidated (A37). Both the *Land* and *O'Daniel* complaints contained allegations that they were brought as class actions. However, no order declaring any Commonwealth case, including *Berry I,* to be a class action was entered until February 2, 1972 (A148). This was the order entered in *Land,* under which notice was sent to all members of the *Land* class, including the individual *Berry II* plaintiffs and all the members of the class they now purport to represent (A37-38).

At that time *Berry I* had not been declared to be a class action (A216).* No notice issued in that action had been sent to any putative class members therein.

* Subsequently, as a part of the overall settlement in *Land* and the reorganization of Commonwealth, a settlement was made in *Berry I,* and to consummate it, on July 26, 1972, Commonwealth consented to a class action order in the District of Arkansas (A49, esp. § 2.2).

Counsel in those cases had no authority to act for purported class members. They submitted no evidence of any authority to act for the *Berry* "class members" to the Court in the *Land* case. None had been granted by the District Court in Arkansas.

As the Supreme Court has stated:

> ". . . the trial court, or this court, has power, at any stage of the case, to require an attorney, one of its officers, to show his authority to appear." *Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315, 319 (1927).

Accord, In re Retail Chemists Corp., 66 F.2d 605 (2d Cir. 1933); *Alamo* v. *Del Rosario*, 98 F.2d 328 (D.C. Cir. 1938).

An attorney has no power to commence, conduct, or settle a lawsuit, and to bind a client absent the authority given him by the client. *Stone* v. *Bank of Commerce*, 174 U.S. 412, 423 (1899):

> "It might be convenient to have such power and the commencement of a suit and a retainer to defend may be a mere technicality, but the power of an attorney depends upon the authority given him to commence a suit or to defend a suit actually brought, and he has no power as an attorney until such fact exists."

Accord, Committee on Professional Ethics & Grievances v. *Johnson*, 447 F.2d 169 (3d Cir. 1971); *Schwarz* v. *Thomas*, 222 F.2d 305 (D.C. Cir. 1955); *West* v. *Bank of Commerce & Trusts*, 167 F.2d 664 (4th Cir. 1948); *cf. Hickey* v. *Illinois Central R.R.*, 278 F.2d 529, 532 (7th Cir.), *cert. denied*, 364 U.S. 918 (1960) (class action context).

An attorney has no right to surrender rights of persons *not* his clients. *See Himmelfarb* v. *United States*, 175 F.2d

924, 931 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949); 7 C.J.S. *Attorney & Client*, § 100c (1937).

For the extraordinary proposition that a lawyer may bind persons as to whom he has received no personal or court ordered authorization to act plaintiffs cite (Pl. Br. 9) but two cases. *State* v. *McDonald*, 50 Wis. 2d 534, 184 N.W. 2d 886 (1971); *Mountain States Telephone and Telegraph Co.* v. *Dept. of Labor and Employment*, 520 P. 2d 586 (Colo. 1974). In each case, however, there was an existing attorney-client relationship not present here.

Indeed empowering attorneys to deprive persons of the benefits of class standing, without their consent, would be an unconstitutional denial of due process. *See, North Georgia Finishing Inc.* v. *Di-Chem, Inc.*,—U.S.— 95 S.Ct. 719 (1975); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

The District Court correctly held that "opting out is an individual right to be individually exercised and cannot be the subject of a blanket exclusion" on behalf of another undeclared "class" (A63). To permit an attorney to opt out a class or subclass would make a class action impossible to manage. The very purpose of Rule 23 would be subverted.

Plaintiffs contend that the class may have acquiesced after the fact in the request for exclusion (Pl. Br. 9). There is no evidence that the *Berry I* class ever knew that these attorneys sought exclusions for their "class" (A37). Yet these attorneys claim they had a right, without notice to or authorization from such persons, to deprive them of their right to participate in that litigation, despite the fact that such persons had by prior court order been declared members of the *Land* class.

One court has recently considered the extent to which an individual can take actions affecting the rights of an undeclared class. In *Harrigan* v. *United States,* 63 F.R.D. 402, 409 (E.D. Pa. 1974), class action status was denied to claims under the Federal Tort Claims Act. The court concluded that it could not allow "the named plaintiff here, by filing an administrative claim on his own behalf, to satisfy the administrative claim requirements for unnamed plaintiffs . . . ." The court concluded that each individual member of the purported class was required to file on his own behalf.

The document purporting to be a "Request for Exclusion" concluded that the "plaintiffs in the *Berry* case and in the *O'Daniel* case by their attorneys of record hereby request exclusion." (A44) There were only four named plaintiffs in the *Berry I* case, Berry Petroleum, O'Daniel, Law, and Patten & Co. (A49). Attributing to the word "plaintiffs" its normal meaning, the Request for Exclusion could apply only to the named plaintiffs. This interpretation is reinforced by recent cases holding that class members who are not named plaintiffs are not "parties" to the action. *See, Greenfield* v. *Villager Industries, Inc.,* 483 F.2d 824 (3d Cir. 1973); *Pearson* v. *Ecological Science Corp.* [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,030 (S.D. Fla. 1973).

Class litigation would be utterly unmanageable if the Request for Exclusion of the *Berry I* plaintiffs were given the effect urged by appellants. A class suit could be frustrated at any stage short of judgment by the simple expedient of wholesale "Requests for Exclusion" filed by lawyers in other overlapping class actions. Even in the chaotic era of competing class suits which preceded the Judicial Panel on Multidistrict Litigation, it was never seriously suggested that one class suit could upstage an-

other by a wholesale opt out. The law has been and still is that the first class judgment binds all class members, including those certified in other actions, except for those who have duly elected to be excluded by individual requests.

It should also be noted that members of the purported *Berry II* class have had the benefit of the settlement in the *Land* case. The fact that such plaintiffs were members of the *Land* class was recognized by all parties at the time the settlements in the *Land* and *Berry I* cases were entered into (A152, §§ 1.3, 4.1(a); A49 § 1.3). Members of the *Berry I* class accepted, out of the overall settlement fund in the *Land* case, 54,365 shares of common stock of Commonwealth plus $325,000 in cash (A52). Thus, the *Land* Stipulation of Settlement provides:

> "§ 4.1 As of the Closing Date under the Purchase Agreement, Settlement Shares shall be distributed or reserved for distribution as follows:
>
> > (a) 54,365 common shares to persons who received shares of CUC pursuant to the agreement between CUC and Berry Petroleum Company, an Arkansas corporation, dated as of August 20, 1968, subject to settlement of the Berry Cases and judicial approval thereof." (A157).

Appellees and other defendants in *Land* have made large contributions toward settlement of the *Land* case, and judgments have been entered dismissing the claims against them.* Under these circumstances, defendants such as Allen, Arthur Young & Company, and the Kleiner Bell Group are entitled to the benefiits of *res judicata*.

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* Allen contributed $150,000, Arthur Young & Company contributed $950,000, and the Kleiner Bell Group has contributed $1,400,000 in money and value of released claims (A245, A181, A223-225).

II

Berry Petroleum was properly dismissed as a plaintiff because it suffered no damage.

Plaintiff Berry Petroleum Company has suffered no damage and has no claim. Its complaint herein so indicates.

On August 20, 1968 Berry entered into a Plan and Agreement of Reorganization ("Agreement") with Commonwealth (A17, ¶ 18). The Agreement provided for the transfer to Commonwealth by Berry of all of Berry's assets and business and goodwill in exchange for common stock of Commonwealth, the prompt dissolution of Berry, and the distribution of such common stock to the holders of Berry stock according to their respective interests (A13, A17, A36-37).

The Agreement further provided in Article XIV (¶ 14.01) that "distribution by Berry to [First National Bank as] Trustee shall constitute distribution to the stockholders of Berry." The Agreement of Reorganization was consummated in Dallas, Texas on October 31, 1968 (A21). Berry immediately distributed to its stockholders the common stock of Commonwealth received by it in exchange for its assets as was contemplated by the Agreement (A17, A37). Berry was dissolved the very same day (A13).

The stock transferred by Commonwealth on October 31 had a higher market price than on August 2 or when Berry had agreed to accept the offer subject to stockholders approval (A37). Since Berry was required forthwith to distribute the stock, and did so, and since the stock meanwhile remained at a value in excess of the agreed value, Berry suffered no loss. As Judge McFadden noted (A64-65), the decline in market value which caused the claimed losses occurred after Berry distributed the shares to its stockholders.

Plaintiffs' brief cites authorities for the proposition that a corporation has standing to sue as a defrauded purchaser or seller of securities (Pl. Br. 14-15). Obviously so. None of the plaintiffs' citations, however, confers standing to sue on a corporation for having been fraudulently induced to acquire shares for the sole purpose of forthwith distributing them to its own shareholders under a plan of liquidation and dissolution. *Fidelis Corp.* v. *Litton Industries Inc.*, 293 F. Supp. 164 (S.D.N.Y. 1968), one of plaintiffs' citations (Pl. Br. 15), dealt with that type of transaction. *Fidelis*, however, sustained the standing to sue of the distributee-shareholders, not the corporation's standing which was in no way challenged.

In our case the standing of the pass-through corporation, Berry Petroleum, *is* challenged. The District Judge properly dismissed Berry because it was a mere conduit and did not and could not sustain any damage, in contradistinction to its distributee-shareholders who are also before the court, although barred on other grounds.

Furthermore, any former Berry stockholder who sold his Commonwealth securities immediately after having received them could not possibly have had a loss in light of the market price for the Commonwealth securities (A37). Indeed such a Berry stockholder might even have made a profit given subsequent increases in the price of Commonwealth shares (A37; SR 317, p. 12).

To permit Berry Petroleum to recover on any theory that the recovery should be for the benefit of all its shareholders would have the effect of awarding double recovery. This would also mean that certain Berry holders, who had no loss at all, could obtain damages.

III

This action was properly dismissed as barred by the Statute of Limitations.

The District Court properly held that the *Berry II* action is barred by the statute of limitations (A67). The alleged fraud occurred in 1968 but the *Berry II* action was not begun until more than four years later on December 15, 1972 (A4).

Since the Securities Exchange Act contains no limitation on the time for suit, the applicable limitation of the forum state, Texas in this instance, must be applied. *Saylor* v. *Lindsley*, 391 F.2d 965, 970 (2d Cir. 1968); *Hooper* v. *Mountain State Securities Corp.*, 282 F.2d 195, 205 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961).

As the District Court noted (A65), the possibly applicable Texas statutes are either the two-year limitation, which applies to claims of fraud, Tex. Rev. Stat. Art. 5526, (*see*, *Hendricks* v. *Flato Realty Investments*, [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,290 (S.D. Tex. 1968) (dictum)), or the three-year blue sky provision, Texas Securities Act, Art. 581-33 (*Richardson* v. *Salinas*, 336 F. Supp. 997 (N.D. Tex. 1972)). The District Court determined that the blue sky provision is not applicable, since it is a limitation upon the right created by that statute, and, accordingly not subject to being borrowed.* It follows, under the opinion below, that the two-year general

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* This court has uniformly applied fraud statutes of limitations rather than Blue Sky provisions. *See, e.g.*, Klein v. Shields & Co., 470 F.2d 1344 (2d Cir. 1972); Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951). *See generally* Martin, *Statutes of Limitations in 10b-5 Actions: Which State Statute is Applicable?*, 29 Bus. L. 443 (1974); Ruder & Cross, *Limitation on Civil Liability Under Rule 10-5*, 1972 Duke L. J. 1125, 1142 (1972). However, the Fifth Circuit has recently held, in a securities case arising in

statute governing fraud actions applies. However, the court found that regardless of which statute applied, the claims were barred (A67).

Plaintiffs apparently recognize that this suit, *Berry II*, is time-barred unless they can establish that the alleged fraud was concealed from them and could not have been discovered with due diligence within three years of suit. Thus, ¶ 24 of the *Berry II* complaint alleges defendants' concealment of the facts until after May, 1970 when a reorganization proceeding for Sunset Petroleum, a Commonwealth subsidiary, was commenced (A 23).

The statute of limitations runs from the date when plaintiffs learned, or through the exercise of reasonable diligence should have learned, of the alleged fraud. *Klein* v. *Shields & Co.*, 470 F.2d 1344, 1347 (2d Cir. 1972); *Clement A. Evans & Co.* v. *McAlpine*, 434 F.2d 100, 104 (5th Cir. 1970), *cert. denied*, 402 U.S. 988 (1971); *Janigan* v. *Taylor*, 344 F.2d 781 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965); *Hooper* v. *Mountain States Securities Corp., supra* at 206. Plaintiffs may not simply assert their own ignorance of the facts to toll a statute of limitations. *Hupp* v. *Gray*, 500 F.2d 993 (7th Cir. 1974); *Morgan* v. *Koch*, 419 F.2d 993, 997 (7th Cir. 1969). Plaintiffs have the burden of showing

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Florida, that the limitation found in the state statute closest in nature and purpose to Section 10(b) should be borrowed. The Court held that Florida's blue sky rather than the general fraud statute ought to be applied to a Rule 10b-5 claim. Hudak v. Economic Research Analysts, Inc., 499 F.2d 996 (5th Cir. 1974). The Fifth Circuit stressed that Florida's blue sky provision was worded identically with Rule 10b-5, has been construed judicially to create causes of action for both defrauded purchasers and sellers, and the remedy was similar. By way of contrast the most analogous Texas statute is not the blue sky statute, comparable to § 12(2) of the Securities Act of 1933, but § 27.01 of the Texas Business and Commerce Code proscribing fraud in securities transactions. The latter as well as fraud actions generally is governed by the two-year limitation period set forth in Tex. Rev. Stat., Art. 5526.

that they exercised reasonable diligence in seeking to learn the facts which would disclose the fraud. *Hupp* v. *Gray*, *supra*. This they cannot do. Here plaintiffs had ample notice of facts which must have alerted them to the claims asserted in this action.

On the facts alleged in the *Berry II* complaint, the claim arose not later than October 31, 1968, when the challenged transaction was consummated and the Commonwealth shares were distributed to plaintiffs and class members (A17, A37). The *Berry II* suit was commenced December 15, 1972 (A4). The claims were barred even under a three-year limitation period, unless plaintiffs can establish that the "fraud" was not or could not have been discovered with reasonable diligence before December 14, 1969, three years before they commenced the action.

The event alleged to have awakened them (the filing for reorganization by Sunset Petroleum, a Commonwealth subsidiary) cannot be reasonably invoked*, in light of the numerous other events of significance for Commonwealth which transpired prior to December 14, 1969.

As the *Berry II* complaint alleges, trading in Commonwealth securities was suspended by the American Stock Exchange on July 22, 1969 (A18). The Securities and Exchange Commission suspended over-the-counter trading

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* As to the allegations regarding the assets and financial difficulties of Commonwealth's subsidiary Sunset, the financial and proxy statements and prospectuses spelled out in spades (including a $19 million write-off in 1967) the financial debacle which Sunset was undergoing. (*See* October 16, 1968 prospectus pp. 19, 36-39, SR 316). They operated to put plaintiffs on notice of whatever facts they needed to decide whether to institute litigation based on Sunset's financial difficulties. Technology Capital v. Electronic Memories & Magnetics Corp., Docket No. C-73-0449-CBR (N.D. Cal. January 20, 1975). Indeed the various complaints in the *Land* litigation asserted claims in regard to Sunset. *See, e.g.*, the initial *Land* complaint, filed August 27, 1969 (SR 1).

in Commonwealth securities on August 1, 1969 (A18). As the *Berry II* complaint also alleges, during the same period of time, the price of Commonwealth securities dropped sharply (A18).

Shortly after trading in Commonwealth securities was halted by the American Stock Exchange and the Securities and Exchange Commission, a host of lawsuits followed. The *Land* action was commenced August 27, 1969 in the Southern District of New York (A103). Eight other actions asserting securities fraud regarding Commonwealth were soon commenced in the Southern District (A70), and numerous other similar actions ensued in other district courts around the United States. *In re Seeburg-Commonwealth United Merger Litigation*, 312 F. Supp. 909, 912 (J.P.M.L. 1970).

Furthermore, the Securities and Exchange Commission instituted an action against Commonwealth and an injunction was consented to by Commonwealth in October 1969. These events were well publicized in the newspapers. *New York Times*, October 3, 1969, at 63, col. 4; *Wall Street Journal*, October 3, 1969, at 28, col. 2.

Of course, all the lawsuits were matters of public record.* In addition, Commonwealth publicly disclosed prior to December 14, 1969 the claims in such lawsuits in proxy material distributed to all of its stockholders, including the former Berry shareholders who retained their Commonwealth stock (A37). The *Berry II* plaintiffs cannot claim the alleged fraud was concealed or that they could not have discovered such facts.

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* A party is on constructive notice of pleadings available as a matter of public record in another court. Maine v. Leonard, 365 F. Supp. 1277, 1283 (W.D. Va. 1973); Tobacco & Allied Stocks, Inc. v. Transamerica Corp., 143 F. Supp. 323, 329 (D. Del. 1956), *aff'd*, 244 F.2d 902 (3d Cir. 1957); Henis v. Compania Agricola de Guatemala, 116 F. Supp. 223 (D. Del. 1953), *aff'd*, 210 F.2d 950 (3d Cir. 1954).

The filing of all these complaints prior to December 14, 1969 not only establishes notice—or lack of concealment—as a matter of law, but also establishes as a matter of fact that plaintiffs' claims could have been known to them by reasonable diligence. The claims herein are substantially identical to those made in the *Land* case, which was commenced on August 27, 1969 (A103), three years and four months before the present action was instituted. The fact that these actions were begun more than three years before the instant case was commenced provides irrefutable evidence that the alleged fraud could have been discovered with reasonable diligence more than three years beforehand. Other parties discovered the alleged fraud, and commenced their actions making the same charges the *Berry II* plaintiffs alleged in December, 1972.

Since these facts were readily available for plaintiffs' consideration well prior to December 15, 1969, their claim for relief is barred even by the 3-year statute of limitations set forth in Texas Securities Act, Art. 581-33.

In *Turner* v. *Lundquist,* 377 F.2d 44 (9th Cir. 1967), plaintiff sought to recover under Rule 10b-5 for alleged fraud connected with his purchase of a debenture. The action was filed three years and four months after the purchase. In *Turner* plaintiff had available information from the annual financial reports received more than three years before the suit was commenced which would put a reasonable man on inquiry as to possible fraud. Among other things, these reports indicated that substantial losses had been incurred, and included a balance sheet reflecting a substantial decline in shareholders' equity and a retained earnings deficit. (The very same facts were here a matter of public record with respect to Sunset.) The Court held in *Turner* that such information was sufficient "to have

put him on notice and inquiry'' and upheld dismissal of the complaint. The Court noted that "failure to discover all the *details of a fraud* does not prevent the statute from running." *Id.* at 48 (emphasis added). *See also, Klein* v. *Bower,* 421 F.2d 338, 343 (2d Cir. 1970), where plaintiff's claim was dismissed despite his protestations that he did not learn the "full enormity" of the fraud until just prior to bringing suit. The court held that the "statutory period . . . did not await appellant's leisurely discovery of the full details of the alleged scheme." *Accord, Mittendorf* v. *J. R. Williston & Beane,* 372 F. Supp. 821 (S.D.N.Y. 1974); *Rickel* v. *Levy,* 370 F. Supp. 751 (E.D.N.Y. 1974). Also in point is the recent decision of *Hupp* v. *Gray, supra,* where the court held that a plaintiff was time-barred when he had failed to investigate a precipitous decline in the price of his stock.

Here, not only were the facts available, but Commonwealth had given notice of the charges here made to all its shareholders, including plaintiffs (A37). Under these circumstances the *Berry II* plaintiffs' claims are barred.

POINT IV

Plaintiffs inexcusably delayed this action until after certain appellees and other defendants in the *Land* action had committed themselves to the *Land* settlement, and plaintiffs are estopped and barred by their laches from maintaining this action.

In the *Berry I* action plaintiffs sued only Commonwealth and a subsidiary of that company (A49, A59). The *Berry I* plaintiffs settled with Commonwealth, receiving for themselves and their sub-class 54,365 shares of Commonwealth stock and $325,000 cash. *See* pp. 5-6 *supra.* That settlement was agreed to in May of 1972 (A38).

Although it is plain that the *Berry* settlement was intended to satisfy all claims of the *Berry* sub-class, the present plaintiffs urge that it was always contemplated that plaintiffs would later pursue the same claims against appellees and other defendants (Pl. Br. 10-11). Assuming *arguendo* that this is so, the present plaintiffs have yet to explain why they waited six months after consummation of their settlement to bring the present action.

During that six month period the *Land* settlement, whose pendency was recited in the *Berry* settlement stipulation (A49, § 1.4), was consummated with Allen and the Kleiner Bell Group, as well as numerous other defendants common to both this action and the *Land* complex of cases. Allen contributed $150,000 to the *Land* settlement (A215), and the Kleiner Bell defendants $125,000 (A223), plus the release of claims and surrender of a contract (A152, § 3.4(c), (d), valued at several times that amount.* The master Stipulation of Settlement in *Land* explicitly recites "the contemplated stipulation of settlement of the Berry cases." (A152, § 1.5).

The conclusion is inescapable that the Berry plaintiffs either deliberately withheld the present suit until the *Land* settlement was substantially committed and consummated or, at the least, that the Berry plaintiffs, without excuse or reason, delayed assertion of their new claims until Allen and the Kleiner Bell Group, among other defendants, were committed to a substantial settlement. In such circumstances the withheld claims, if not barred by limitations, will be barred under the doctrine of estoppel and laches. As held in *Galliher* v. *Cadwell,* 145 U.S. 368 (1891), a leading authority on the defense of laches:

> "The cases are many in which this defense has been invoked and considered. It is true, that by rea-

* Arthur Young's settlement was made in 1973. (A176, § 2).

son of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them.

* * *

But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

CONCLUSION

The judgment of dismissal in favor of defendants-appellees should be affirmed because (A) plaintiff McAlester Fuel and the class which all the plaintiffs purport to represent are barred by judgments of dismissal in an earlier class action, (B) plaintiff Berry Petroleum, a dissolved corporation and a mere conduit to its former shareholders, has no standing to sue, (C) all the claims are barred by limitations, and (D) all the plaintiffs are barred by estoppel and laches.

Dated: March 12, 1975
New York, New York

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C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Index No.

In Re SEEBURG-COMMONWEALTH UNITED LITIGATION

BERRY PETROLEUM COMPANY, an Arkansas Corp. (Dissolved), et al.,

Plaintiffs-Appellants,

against

ADAMS & PECK, et al.,

Defendants-Appellees.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 425 Neptune Ave., Brooklyn, N. Y.

That on March 12, *19*75 *deponent served the annexed* BRIEF of APPELLEES, ALLEN & COMPANY INCORPORATED, et al.,

on the *attorney(s) for* the Appellants and all parties of record herein as per attached list *in this action at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

Sworn to before me this

12th day of March, 1975.

Robert A. Perkins

ROBERT A. PERKINS
Notary Public, State of New York
No. 41-8327500 - Queens County
Certificate filed in New York County
Commission Expires March 30, 1976

Leonard F. Villa

The name signed must be printed beneath

LEONARD F. VILLA

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law

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SIR:

PLEASE TAKE NOTICE that a..........................

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of which the within is a true copy, has been made herein and was duly entered and filed in the office of the Clerk of the

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on the......................day of..............................

19..........................

WHITE & CASE

Attorneys for..

14 Wall Street,
Borough of Manhattan,
New York City.

To..

Attorney for..

INDEX NO. DOCKET NO. 74-2588

UNITED STATES COURT OF APPEALS : SECOND CIRCUIT

In Re SEEBURG-COMMONWEALTH UNITED LITIGATION

BERRY PETROLEUM COMPANY, an Arkansas Corp. (Dissolved) et al.,

Plaintiffs-Appellants,

-against-

ADAMS & PECK, et al.,

Defendants-Appellees.

ORIGINAL

BRIEF OF APPELLEES, ALLEN & COMPANY INCORPORATED, et al.

WHITE & CASE

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